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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, *Petitioner*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Petitioner was born in Denmark on November 23, 1926. On February 20, 1950 he was lawfully admitted to the United States for the purpose of permanent residence. In August of 1950 petitioner registered under the Selective Service Act of 1948 and in the following month, September 20, 1950, was classified I-A and ordered to report for induction. (A. 8-9, 44).

On November 14, 1950, petitioner executed SSS Form 130, a request for exemption from military

service on the ground of alienage, believing such exemption would be permanent. At the time petitioner requested exemption he was not certain he wished to stay in the United States. He had come here after a fourteen month tour with the Danish Navy, had been the sole support of his mother for the preceding three years, and was seriously considering returning to Denmark. (A. 27-30).

The day after petitioner signed form 130 he was reclassified IV-C. The IV-C classification (alien not currently liable for military service) was granted pursuant to §4(a) of the Selective Service Act of 1948. 62 Stat.L. 604 (1948).

In 1951 Congress amended the Selective Service Act of 1948 so that §4(a) no longer provided the procedure for the exemption of resident aliens (65 Stat.L. 75) and, on August 6, 1952, pursuant to that change, petitioner's draft board reclassified him I-A. Petitioner was ordered to report for induction on August 18, 1952. Petitioner wound up his personal affairs and informed his employer that he was being drafted and would be gone for two years. But on September 2, 1952, he was examined and found not physically fit for military service. On November 24, 1952, his draft board reclassified him V-A (registrant over the age of liability for military service). (A. 9, 44-45).

In December 1952 the Immigration and Nationality Act of 1952 became effective. §315(a) of that Act, which the Appellate Court held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment occurred

only if the alien applies or has applied for relief *and* "is relieved . . . on such ground."

On May 14, 1965 petitioner filed his petition for naturalization. (A. 5-6). The Immigration and Naturalization Service opposed the petition. The District and Appellate Courts found petitioner ineligible for citizenship.

OPINION BELOW

The decision of the Court of Appeals is reported at 432 F.2d 438 and at A. 49. The Memorandum of Decision of the District Court, which is unreported, is reproduced at A. 43-47.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1). The judgment of the Court of Appeals was entered on July 8, 1970. The petition for writ of certiorari was filed on October 12, 1970 and was granted on January 18, 1971.

QUESTIONS PRESENTED

1. Whether Section 315 of the Immigration and Nationality Act should be interpreted to mean that an alien who signed a request for exemption from military service under the impression that he would be permanently exempt from military service should

be disbarred from citizenship notwithstanding the fact that his draft exemption was removed by Congress and that consequently he would have served this country during the Korean War but for the fact that he did not pass his induction physical examination.

2. Whether the signing of a request for relief from training and service in the armed forces, executed under the mistaken belief that it did in fact relieve one perpetually from military training and service, is a "knowing waiver" of eligibility for citizenship.

3. Whether Section 315 of the Immigration and Nationality Act, when interpreted by the courts to grant citizenship to those aliens who requested exemption from military service but were inducted into the Armed Forces while denying citizenship to similarly situated aliens who could not pass the physical examination, creates such an unreasonable classification that it violates the guarantee of due process of law.

4. Whether a denial of citizenship to an alien when he could not serve in the military because of a physical disability violates the Eighth Amendment's proscription of "cruel and unusual punishment."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

Section 315 of the Immigration and Nationality Act, 8 U.S.C. section 1426(a):

"Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Section 4(a) of the Selective Service Act of 1948, 62 Stat.L. 604, 605-606:

"Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

Section 4(a) of the Universal Military Training and Service Act of 1951, 65 Stat.L. 75, 76:

". . . every male alien admitted for permanent residence . . . shall be liable for training and

service in the Armed Forces. . . . *Provided further,* That any male alien . . . who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States."

SUMMARY OF ARGUMENT

Petitioner came to this country in 1950 and, during that same year, applied for exemption from military service. He was informed that by doing so he would be forever debarred from citizenship. But he was also informed that, in exchange for relinquishing the opportunity to become a citizen, he would receive release from liability in the military service.

In the Introduction to our Argument we demonstrate that the bargain struck between the government and petitioner was a traditional one with a history extending to the Civil War. From the time of the Civil War through 1950 it was recognized that military service was a citizen-responsibility; neutral

aliens were not conscriptable. Aliens taking advantage of their non-conscriptable status were forever barred from citizenship but, because they could not acquire the benefits of citizenship, they were also forever relieved of the supreme obligation of citizenship: military service.

In 1951, however, Congress, in a drastic departure from previous law, made permanent resident aliens conscriptable. Petitioner, in spite of his agreement with the government, became liable for military service, was in fact drafted and would have served in the armed forces but for his inability to pass the induction physical. Petitioner willingly submitted to induction because, since 1950, he had decided to make the United States his home and was not at all adverse to shouldering the responsibilities of citizenship.

By conscripting aliens under the law of 1951, Congress had failed to meet its half of the bargain it had made with thousands of aliens. The simple application for alien-exemption was supposed to fulfill two purposes: (a) forever debar the alien from citizenship, and (b) forever release the alien from military obligation. The applications filed before 1951 had accomplished the first purpose but not the second. Those aliens were debarred from being citizens but had become liable for military service. The inequity of this arrangement was obvious and, in 1952, Congress adopted §315 of the Immigration and Nationality Act to provide a two-pronged test for citizenship ineligibility. An alien would be permanently debarred from citizenship only if two criteria were met;

ineligible aliens were those who made application for exemption *and* were relieved from liability for military service by virtue of that application.

Under the rubric Argument, we first urge this Court to give §315 the construction which, to us, seems the only reasonable one. §315, we contend, should be read to permit the granting of citizenship to petitioner. He did make application for exemption but he was not effectively relieved from the citizen-obligation of military service. Thus the two-pronged test has not been satisfied and petitioner is eligible for citizenship. Petitioner did, true enough, receive a short-term deferment, from 1950 to the adoption of the 1951 Act, making him conscriptable, but, as history reveals, the relief from liability he was supposed to be receiving in 1950 was a *permanent* relief and the relief from liability Congress had in mind in §315 must have been a *permanent* relief.

Secondly, we urge that petitioner should be granted citizenship pursuant to the rule of "fundamental fairness" announced by this Court in *Moser v. United States,* 341 U.S. 41 (1951). Moser, like petitioner here, executed a request for the alien-exemption. He was not held to it because he was misled as to the consequences of requesting exemption. He was officially told that he would not permanently be debarred from citizenship. An analogous situation is presented here. Petitioner was officially misled as to the nature of the bargain he was making. He was told he could not become a citizen but that he would not be liable for military service. The agreement was illusory; he be-

came liable for military service. Accordingly, petitioner should not be held to the bargain. The manner in which it was presented to him deprived him of the opportunity to make a fair choice between exemption and forfeiture.

Finally, we briefly discuss the constitutional issues presented by the government's construction of the statute. The government reads §315 in a very novel manner. As we have noted, §315 provides that the ineligible alien is one who both applies for exemption and is relieved of liability for military service. Petitioner's "temporary" relief is enough to bring him within the §315 forfeiture, the government says. But all "temporary relief" is not relief within the meaning of §315 according to the government. It finds some cases of "temporary" relief agreeable. The "temporary" relief cases receiving the government's imprimatur are those in which the applicant for exemption found himself not only liable for military training but actually in the army. The upshot of the government's position is this: petitioner falls in the class of ineligible citizens because and *only because* he flunked an induction physical.

We think that position untenable. It is inconsistent with due process because it conditions citizenship on the fulfilling of a condition unrelated to the purposes of citizenship. It is inconsistent with the Eighth Amendment because it works a forfeiture for an illness.

The government has previously fobbed these constitutional issues off with a talismanic incantation about

the power of Congress to do whatever it pleases where Naturalization is involved. Even if that were so (and we are not prepared to concede at this point in time that the Congressional power to withhold citizenship contains a "lesser" power to grant it on any captious conditions Congress sees fit to attach) it would be beside the point. It is not the plain language of §315 with which petitioner quarrels, but the curious and arbitrary gloss proposed by the government and adopted by the Court below. Even where the Constitution arguably places no limits on Congressional authority, this Court, absent the most explicit indications, will not assume that Congress has acted in a manner inconsistent with fundamental constitutional guarantees. The hostility between the government's interpretation of §315 and the most elementary constitutional principles is a certain indication that the government is misreading the statute and that Congress did not intend to grant citizenship only to those persons in petitioner's class who can pass an induction physical examination.

INTRODUCTION

Petitioner, the Court below held, may never become a citizen because he executed a request for release from military service. In exchange for the forfeiture of an opportunity to become a citizen, however, petitioner was to be relieved of all obligation for military service. He did not receive that release: he was drafted. And because he did not receive an effective

release from his military obligation he has not forfeited his right to citizenship. That, at any rate, is what §315 of the Immigration and Nationality Act, 8 U.S.C. §1426(a) says. §315 provides that one who applies for exemption *and* is relieved from military service shall be permanently ineligible for citizenship. It seems unambiguous but, evidently, the Court below read the "relief" language to include a temporary relief. §315, we think, cannot be so read.

Petitioner became liable for military training and service because Congress, in the Universal Military Training and Service Act of 1951, 65 Stat.L. 75, §4 (a), made permanent alien residents conscriptable. The conscripting of neutral aliens who had made no declarations of intention to become citizens was a significant departure from previous law. Before 1951 permanent residents whose alien status remained unchanged were simply not draftable if they elected to avoid military service. Military service was deemed an unavoidable duty of citizens only. Aliens taking advantage of their status placed themselves beyond the pale; they could not become citizens but, because of that, they had no duty to serve. They were forever outsiders. When §315 is read in that light it is manifest that Congress, by "relieved" from military service, meant *permanent* relief and that the "two-pronged" requirement of application for exemption and relief from obligation is satisfied only where the alien has received permanent relief. That same history also demonstrates that at the time petitioner executed the request for release from military obligation both

parties to the agreement, petitioner and the government, believed he was exchanging potential citizenship for a permanent non-draftable status.

Because the history of the alien's exemption from military service so vividly illuminates the critical issues in this case we now turn to that history.

THE HISTORICAL BACKGROUND

(A) Pre-1917

The obligation to bear arms has historically been regarded an obligation of citizenship. Borchard, *Diplomatic Protection of Citizens Abroad,* 11 (1915).

Before the Civil War we insisted that our citizens be free of military service abroad and, consistently, excluded aliens from our armed forces. In 1804 James Madison explained the rationale for our attitude:

> "Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both. . . ."
>
> 4 Moore, *International Law Digest* 52 (1906).

In 1862, Secretary of State Seward confidently wrote: "I can hardly suppose that there exists, anywhere in the world the erroneous belief that aliens are liable here to military duty." But when we adopted conscription during the Civil War, 12 Stat.L. 731 (1863), aliens for the first time became liable to serve

in the armed forces of the United States. The class of aliens upon whom draft liability was imposed was limited to those who had declared their intention to become citizens of the United States. Nevertheless, diplomatic protests followed. We were, it was said, violating home laws and the law of nations by conscripting foreign nationals. Consequently, President Lincoln, by proclamation, extended to declarant aliens the right to withdraw their declarations. If they did so, however, they were required to leave the country within sixty-five days. 13 Stat.L. 732 (1863). In May of 1863, then, the alien was first given the choice of serving our country or becoming an outsider. The choice was presented only to declarant aliens and, should they elect not to serve, they became outsiders quite literally. The bargain was not subtle but neither was it ambiguous: one said he had changed his mind about citizenship because he did not wish to serve and was told to leave. He would, in perpetuity, receive neither the benefits nor the burdens of citizenship.

For the balance of the Nineteenth Century the nonconscriptability of aliens continued to be recognized in practice. In 1880 when American nationals were impressed into military service by Mexico, Secretary of State Blaine asserted that compulsory draft of neutrals was a violation of international law (4 *Moore, supra,* p. 61). Draft liability for declarant aliens was included in the Spanish American War Act (30 Stat.L. 361 (1898)) but the ranks were filled entirely by volunteers and no aliens were drafted. And as late as September 26, 1917, Secretary of State

Lansing admitted the existence of the principle of international law preventing the compulsory drafting of neutral aliens unless the Nation is called upon to resist an invasion. (Hearings before the House Committee on Military Affairs, 65th Cong., 1st Sess. 1917, pp. 4, 10 (S.J. Res. 84)).

(B) Alien conscription and the first world war

The Selective Service Act as originally enacted during the first World War again included all declarant aliens (Act of May 18, 1917, 40 Stat. 76, sec. 2).[1] "Almost at the very beginning the neutral nations' diplomatic representation approached the State Department with numerous requests to relieve their nationals from the operation of the law, and many protests were filed against the induction of individual aliens into the military service, as being in violation of international law and treaty obligations." (Second Report of the Provost Marshal General, p. 98 (1919). See also III *Hackworth, Digest of International Law* 603 *et seq.* (1942)).

Secretary of State Lansing testifying before the House Military Affairs Committee on S.J. Res. 84 (65th Cong. 1st Sess.) stated:

> "So far as the drafting of neutral aliens is concerned it would involve us in the greatest

[1]It is said that approximately 40,000 protests were received. Fitzhugh and Hyde, *The Drafting of Neutral Aliens by the United States*, 36 Am.J.Int.L. 369 (1942). And see, Loessler, *Rights and Duties of Declarant Aliens*, 91 U. of Pa. Law Rev. 321, 334, 335 (1942). Borchard, *Diplomatic Protection of Citizens Abroad*, 64-65 (1915), Vattel, *Law of Nations* 399 (1859); 1 Oppenheim, *International Law* 237, 238 (Lauterpact's 5th Ed., 1937); 2 Hyde, *International Law*, 244, 246, 247 (1922).

difficulties. It has never been done, to my knowledge, in this country; not even during the Civil War. Mr. Bayard states that very frankly in reviewing the question when we were protesting against an effort to compel some of our people, whom we claimed were citizens, to do service in foreign armies. We have had a great many controversies, particularly with Austria and Italy, in regard to the service of naturalized citizens of this country who are of Austrian or Italian origin, and who have returned to their country and been forced into the army to do military service, and we have always insisted that the Government had no right to compel such service. For over 100 years that has been the position of the Government of the United States.

* * * * * * *

"We have, of course, several treaties that affect this question, and which would be substantially abrogated by this legislation if it was adopted; and, on the other hand, those countries with whom we have no specific treaty provisions feel as strongly as those with whom we have, and they have just as much right, although not a technical right, to claim on the general principle that their citizens should not be drafted in this country.

"Mr. Burnett. If you will pardon me, Mr. Secretary, that is the principle of international law, also, in regard to neutral aliens?

"Secretary Lansing. Yes.

"Mr. Burnett. Outside of any treaty regulations?

"Secretary Lansing. Yes; and outside of that, as a question of policy, I think it would be most unwise at the present time, when our relations with many neutrals are—I will not say precari-

ous, but of an irritating character. It is even conceivable that it might result in driving some of them into the war against us, or at least taking a very hostile attitude toward us, which would be most unfortunate at this time."

Accordingly, the Act of May 18, 1917, was amended on July 9, 1918, to provide the customary release-from-liability bargain for declarant aliens:

> "Provided, that a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.
>
> 40 Stat.L. 885 (1918).

The bargain, it will be noted, was not nearly as hard as that of the Civil War. One no longer had to leave the country. But the nature of the bargain, when viewed in the context of the offer, was transparent: one renounced his previous declaration of intention to become a citizen and forever lost the burdens as well as the benefits of citizenship.[2]

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[2]There was an interesting side-skirmish in the World War I Congress pertinent to the present case. Bills attempting to bar from citizenship nondeclarant aliens who claimed exemption from service on grounds of alienage (aliens like petitioner) failed to pass Congress. See *Tutun v. United States*, 12 F.2d 763, 764 (1 Cir. 1926). A related development was the introduction of H.R. 9416 by Congressman Lufkin in 1919. The bill provided for the de-

In 1931 the 1917 statute was modified to permit the naturalization of any neutral alien whose withdrawal of the declaration of intention, application for discharge, and discharge occurred after November 11, 1918 (46 Stat.L. 1931). These statutes were repealed by the Nationality Act of 1940 (54 Stat.L. 1172). It has been held that the repeal restored the opportunity for naturalization to those previously debarred from naturalization as neutral aliens claiming exemption during World War I. (*Interpretation 1 of the Immigration Service,* June 5, 1941; *In re Carlson* 730-P 259786 (D. Ill. 1942); *Petition of Otness,* 49 F.Supp.

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portation of neutral aliens who had claimed exemption from military service. (66th Congress, 1st Session). Secretary of State Lansing opposed this bill on the ground that "it may be looked upon by many foreign governments, whose nationals might be affected thereby, as violative of provisions of treaties between the United States and those countries". (House Immigration Committee Hearings on H.R. 9416, Part 2, p. 25). In the same year, the Solicitor of the State Department, Mr. Woolsey, testified in opposition to a similar bill, stating:

> "My own personal view is that it does not seem quite fair, in the act of July 9, 1918, to give these neutrals a right, allow them to exercise it freely, and then seemingly punish them for exercising that right.
>
> • • • • •
>
> "In the State Department we were opposed to the last clause of the act of July 9, 1918, forever debarring a neutral who withdrew his declaration from becoming a citizen. We thought that it was an illustration of a wrong principle in public to have a class of aliens in this country who never could become citizens.
>
> • • • • •
>
> "Now, if there is a treaty exemption from military service, a foreign government might say, 'Our citizens are exempted from military service in the United States on account of the treaty. But you have added a discriminatory penalty to that exemption by requiring that our citizens who refused to enter the military service must leave the country.'" (House Immigration Committee Hearings on H.R. 10010, 66th Congress, 1st Session, pp. 63, 65, 70).

And see *Petition of Tsuji,* 119 F.Supp. 68 (N.D. Cal. 1953) (nondeclarant alien not liable for military service).

220 (N.D. Calif. 1943); *Contra, In re Urmenta*, 42 F.Supp. 138 (D. Wisc. 1941)).

(C) The Act of 1940

The peacetime conscription act of 1940 (54 Stat.L. 885) conformed to former acts. Registration was required of citizens and "every other male person residing in the United States," excepting diplomatic and consular officials.[3] But only declarant aliens were liable for service. Even so, diplomatic protests were again received based on principles of international law. (Senate Report 394, 77th Congress, 1st Sess.) Secretary of State Cordell Hull advised that one country indicated that under its laws its nationals were prohibited from serving in the armies of a foreign state and on numerous occasions in the past the United States had objected to the compulsory military service of its nationals in the armed services of foreign states. (Letter to Senator Reynolds, Chairman Committee on Military Affairs, May 23, 1941).

The 1940 Act was amended by Public Law 360 after our entry into the Second World War. Registration of aliens could be further limited by presidential declaration. Among the registrants, every male alien between specified ages residing in the United States was liable for service. Thus, the distinction between declarant and nondeclarant aliens was for the first time abandoned in practice. The obligation of military

[3]On October 11, 1940, the Attorney General ruled that under the Selective Service Act, every alien between 21 and 36 who lived or had a place of residence, temporary or otherwise, was required to register under the Act. That interpretation was rejected by this Court in *McGrath v. Kristensen*, 340 U.S. 162 (1950).

service was extended to all neutral resident aliens, it was no longer the exclusive burden of those who had formally announced their desire to receive the benefits of citizenship.

The amendment contained the customary relief-from-liability bargain for those who elected to forego citizenship. §3(a) provided:

> ". . . that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."
>
> 55 Stat.L. 844 (1941).[4]

(D) The Act of 1948

The Selective Service Act of 1948, like the World War II Act, applied to all male citizens and other male persons residing in the United States. It contained the usual relief-from-liability-forfeiture-of-citizenship bargain in §4(a):

> "Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made

[4]In 1945, Congress amended 8 U.S.C. §224(c), defining those ineligible for citizenship, to include anyone barred under §3(a) of the Selective Service Act. 59 Stat.L. 551(1945).

application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."[5]

(E) The Act of 1951

In June of 1951 Congress passed the Universal Military Training and Service Act, 65 Stat.L. 75 providing conscription without alternative for nondeclarant aliens. Relief was made available only to those aliens who have "remained in the United States in a status other than of a permanent resident for a period exceeding one year. . . ." It is the 1951 Act which imposed liability on petitioner and he was drafted pursuant to it.[6]

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[5]An Executive Order, No. 9992 (32 C.F.R. 622.18; Federal Register, August 30, 1948) provided the classification for the exempted aliens:

. . . . .

"Paragraph 622.18 Class IV-C: Aliens

. . . (c) In Class IV-C shall be placed any registrant who is an alien and who, prior to his induction has made application to be relieved from liability for training and service in the armed forces of the United States by filing with the local board an Application by Alien for Relief from Military Service (SSS Form No. 130) executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101). * * *"

It was SSS Form 130 which petitioner executed. (R.T. 45).

[6]Although nondeclarant neutral aliens became liable for military service in 1951 it was another decade before they were permitted to enlist in the Army in times of peace. Because of the traditional notion that military service is a citizen-activity, nondeclarant aliens had previously been excluded from peacetime enlistment. See Ch. 179 §2, 28 Stat.L. 216 (1894). 10 U.S.C. §325 3(c) was amended in 1961 by Public Law 87-143 to permit enlistment of aliens "lawfully admitted to the United States for permanent residence . . ."

ARGUMENT

I.

SECTION 315 OF THE 1952 ACT PROVIDES A TWO-PRONGED TEST; ONE FOREVER FORFEITS AN OPPORTUNITY FOR CITIZENSHIP ONLY WHEN: (A) HE APPLIES FOR EXEMPTION FROM MILITARY SERVICE AND (B) HE IS EFFECTIVELY RELIEVED FROM MILITARY SERVICE BY VIRTUE OF HIS APPLICATON FOR EXEMPTION

The review of the history of alien exemption demonstrates that, prior to 1951, neutral aliens who elected to avoid military service became forever outsiders. They were forever debarred from becoming citizens and forever relieved of the citizen-obligation for military service. At first only declarant aliens were put to the choice and the alternative to military service was banishment. By World War I banishment was no longer the alternative, one was simply debarred from citizenship. By World War II nondeclarant aliens were also put to the choice of accepting the burden of citizenship or forfeiting its benefits. That policy carried over to the 1948 statute, the one pursuant to which petitioner applied for exemption. That statute was unambiguous. The applicant was "relieved from liability for training and service under this Title" but "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." §4(a), 62 Stat.L. 604, 605-606 (1948). Application and application alone was the significant event. A two-pronged test of application plus relief would have been superfluous. For the neutral alien, application *meant* both exemption and relief.

The 1951 Selective Service Act, however, departed significantly from traditional alien-exemption law. Permanent residents were no longer to be given an exemption. They were no longer to be put to the choice between service and citizenship. They were to serve.

But what was to become of those permanent residents who had previously made the election and now found themselves within the class of persons liable for military duty? What of those who had been told they were relieved from military service and debarred from citizenship and now found themselves liable to military service? Was it fair to tell a man he could elect not to be a citizen and receive in exchange a release from citizen-obligations and then, after the choice had been made, impose upon him the citizen-obligation but deny him citizenship? Obviously not. And Congress, in 1952, provided against such a manifestly unfair result by adopting §315 of the Immigration and Nationality Act. 8 U.S.C. §1426(a).

Prior to 1951, as we have noted, application resulted in both exemption and debarment. But as a consequence of the 1951 Act, the application's promise of exemption was no longer good. Application no longer meant exemption and since it no longer meant exemption it should no longer, standing alone, mean debarment. Accordingly:

> "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for ex-

> emption,' and also one who 'is or was relieved or discharged from such training or service on such ground.' "
>
> *Ceballos v. Shaughnessy,* 352 U.S. 599, 601 (1957).

In short, those no longer exempt were no longer debarred. Given the history of the alien-exemption as one of permanent release from liability, and the proximity of the 1952 two-pronged test innovation to the adoption of the alien-service-obligation in 1951, no other construction seems possible. Congress must have meant *effective* and *permanent* relief in §315 because if read otherwise it would mean that Congress intended to impose the supreme obligation of citizenship on those to whom it would deny citizenship on the basis of a bargain Congress was violating by the very imposition of the obligation. All of those exempted prior to 1951, after all, received temporary relief. Including those who were to serve in the armed forces after 1951.

Even the government, we take it, concedes that persons temporarily exempted from the military obligation who were later called and served are not debarred from citizenship. They are not debarred because the two-pronged test is not satisfied. They made application, were temporarily relieved, but, since the 1951 Act subjected them to military service, were not effectively relieved within the meaning of §315. See, e.g., *United States v. Lacher,* 299 F.2d 919 (9 Cir. 1962); *In re Rego's Petition,* 289 F.2d 174 (3 Cir.

1961);[7] *Cannon v. United States*, 288 F.2d 269 (2 Cir. 1961); *United States v. Hoellger*, 273 F.2d 760 (2 Cir. 1960).

But how can petitioner's case be distinguished from *Lacher*, et al.? And why should anyone want to distinguish them? The significant event in both cases is the imposition of the military obligation. Acceptance of that obligation forgives the prior application pursuant to §315's two-pronged test. Petitioner accepted his obligation to the same degree as Lacher. He was simply unable to serve because of a physical disability.

> "The anomaly presented by the record is that, whatever may have been appellant's [initial] inner reluctance or hesitation, he actually did submit to the draft machinery, which processed him and then discarded him. What more should he have done? And had the machinery, instead of throwing him out, chanced to have turned him out as an accepted soldier, would he still be considered disaffected and unattached to the Constitution?"
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> *Petition of Kohl*, 146 F.2d 347, 349 (2 Cir. 1945).

No one feels petitioner would not make a good citizen. No one thinks petitioner is unattached to the principles of the Constitution. Petitioner, by submitting to the draft, accepted the ultimate obligation of citizenship. Since that obligation was imposed and accepted, he was not relieved from military service

[7] In *Rego* the government expressed a desire to have citizenship extended to the petitioner (289 F.2d at 175 and 177) although its theory for achieving the desired result is opaque.

within the meaning of §315 and is eligible for citizenship.[8] *United States v. Bazan*, 97 U.S. App. D.C. 108, 228 F.2d 455 (D.C. Cir. 1955) (per curiam); *In re Wendt*, 300 F.Supp. 725 (N.D. Ill. 1969); *In re Petition for Naturalization of Fabbri*, 254 F.Supp. 858

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[8] §315 seems so unambiguous to us, and the denial of citizenship to petitioner so patently unfair, that we have wondered why the government ever entertained the notion that the temporary relief accorded petitioner was relief under §315. We think it may be a misreading of the language we italicize below:

> "Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and *is or was relieved* or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

The government may have reasoned that the words "is or was" convey a temporal meaning and that "was relieved" refers to persons at one time exempt upon whom the obligation was subsequently imposed. That might be a reasonable reading if there were not a class of persons exempted before 1951 not liable to military service after 1951. But there is such a class. Those who avoided military service and then left the country. The petitioner in *Ceballos v. Shaughnessy, supra*, is a good example. The government was under no obligation to admit him to the country; he was, accordingly, not subject to military obligation and thus did not come within §315. When Congress referred to "is or was" relieved it was referring to two classes, those relieved *permanently* in the present and future and those relieved *permanently* by past actions. Congress was not suggesting that temporary relief met the §315 criteria.

We think that explanation disposes of any potential ambiguity. But to the extent the "is or was" language may be thought to make §315 unclear on this crucial point, we respectfully urge that any ambiguity should be resolved in petitioner's favor. Our reading is "the more normal." *In re Rego's Petition, supra*, 289 F.2d at 176. Moreover, a statute making a permanent resident ineligible for citizenship imposes a penalty and "[a] statute which attaches such a penalty to certain conduct should be construed strictly to avoid an imposition which goes beyond the manifest intent of Congress." *Ibid.* Cf. *Kawakita v. United States*, 343 U.S. 717, 728 (1952); *Perkins v. Elg*, 307 U.S. 325, 337 (1939): "Rights of citizenship are not to be destroyed by an ambiguity."

(E.D. Mich. 1966); *Petition for Naturalization of Joseph Kadich,* 221 F.Supp. 353 (S.D.N.Y. 1963); *Petition of Caputo,* 118 F.Supp. 870 (E.D.N.Y. 1954); *In re Kaufmann's Naturalization,* 394 Pa. 625, 148 A. 2d 925 (1959). *Contra, Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9 Cir. 1968), *certiorari denied,* 391 U.S. 951; and the opinion of the Court below, A.49.

II.

PETITIONER, SINCE HE WAS MISLED AS TO THE NATURE OF THE BARGAIN, DID NOT MAKE A KNOWING WAIVER OF HIS ELIGIBILITY FOR CITIZENSHIP

Petitioner signed the "Application By Alien For Relief From Training And Service In the Armed Forces" on November 14, 1950. The application provided that: "I hereby apply for relief from liability and training in the armed forces of the United States." (R.T. 74). That wording was consistent with §4(a) of the Selective Service Act of 1948, 62 Stat.L. 604, 605-606. That law provided, in pertinent part:

> "Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

Petitioner signed the application for relief because he had only been in the country for nine months, had not yet made up his mind whether he wanted to become a permanent resident and because he had just completed a tour of duty in the Danish Navy. (A. 37-38).

In June of 1951, however, Congress passed the Universal Military Training and Service Act, 65 Stat.L. 75, which provided, in §4(a), that relief from military training was available only to those aliens who have "remained in the United States in a status other than of a permanent resident for a period exceeding one year. . . ." It was this provision that resulted in the removal of petitioner's "relief from liability." And it was on the basis of this provision that, on August 6, 1952, petitioner's local board reclassified him I-A and, twelve days thereafter, ordered him to report for induction into the armed services. Petitioner reported as ordered but was found physically unfit for the service. The determination that petitioner was physically unfit came as a surprise to him; he had wound up his personal affairs expecting that he would be gone for a period of two years. (A. 39). In December of 1952, the Immigration and Nationality Act of 1952 became effective. Section 315(a) of that Act, which the District and Appeals Courts held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment only occurred if the alien applies or has applied for relief *and* "is relieved . . . on such ground."

Petitioner can hardly be held to a standard of clairvoyance that would require him to anticipate the

Acts of Congress of 1951 and 1952 which removed his relief from services in the armed forces. As Judge Moore observed in his concurring opinion in *United States v. Hoellger, supra,* 273 F.2d at 766:

> "Appellee fully understood the consequences of his election in claiming draft exemption. He traded ineligibility to become a citizen against relief from service—not a mere temporary stay or deferment subject to cancellation. However, the government's part of the bargain was that he be relieved from service. When the government by its own Act destroyed Hoellger's exempt status by changing its arrangements with Germany, thereby making its national subject to service in our armed forces and thereafter compelled him to serve, it took away the consideration for the original bargain. Because the government deprived Hoellger of that which it represented to him would be granted, it is in no position to insist upon enforcement of citizenship ineligibility, the price he was paying for that which he did not receive."[9]

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[9] ". . . the government denied petitioner's claim of exemption, called him, in good faith he responded, and then it rejected him, because physically unfit. In these circumstances, to allow it to go back of that examination, and resort to the denied claim to bar his admission, would be to sanction bad faith, and is not tolerable. Despite the claim of exemption, he was deemed fit for the highest duty of citizenship, viz. military service, and by that same token he is fit for citizenship itself." *In re Siem,* 284 F. 868 (D. Mont. 1922), aff'd 299 F. 589 (9 Cir. 1924).

Cf. *Staten Island Hygenia Ice and Cold Storage Co. v. United States,* 85 F.2d 68, 71 (2 Cir. 1936):

> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant . . . It should make no difference that the United States is the party against whom rescission is sought."

Petitioner signed the application for relief under a misconception as to its legal consequences. Under the rule of "elementary fairness" announced in *Moser v. United States,* 341 U.S. 41 (1951), petitioner cannot be held to have waived his right to become a citizen.

In *Moser* the alien applying for exemption from military service believed he could do so without surrendering his right to obtain United States citizenship. This belief was encouraged by advice from the Swiss Legation and the United States State Department; Moser testified that had he known that claiming the exemption would debar him from citizenship, he would not have claimed it. (341 U.S. at 45). This Court held that these facts "understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption." (341 U.S. at 46). (Emphasis in original). This Court ordered Moser admitted to citizenship.

In the immediate case petitioner was similarly misled; he misconceived the legal consequences of his act. He believed, as anyone reading the application he signed would believe (see R.T. 74),[10] that in exchange for the forfeiture of his right to become a United States citizen he would, in return, be permanently exempted from military duty. (A. 38). Petitioner would never have executed the application had he not been misled and is accordingly entitled to rely upon the rule of elementary fairness limned in *Moser.*

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[10]The application explicitly states that one executing it "shall be relieved from *liability*" (emphasis added). Relief from "liability" connotes removal of obligation, an extinguishment rather than postponement of responsibility.

The District Court held *Moser* inapplicable, reasoning that petitioner knew he would be relinquishing his right to citizenship and had not been misled as to that fact. (A. 46-47). But the District Court's analysis, with all respect, misses the point; it gives a rule of "elementary fairness" a grudging reading. An alternative, and we think sounder, reading of the *Moser* rule was provided by Judge Learned Hand in *Mannerfrid v. United States*, 200 F.2d 730, 732 (2 Cir. 1952), *certiorari denied*, 354 U.S. 918:

> "*§3(a) does not make a claim for exemption an absolute bar* to naturalization; and that it will not be so, if the alien has been misled even by a third person (as Moser was by the Swiss Legation), *if he has been so deprived of a fair chance to make an intelligent choice between exemption and the forfeiture.*" (Emphasis added).[11]

That describes exactly what happened here. Petitioner was given the choice of accepting the obligation of a citizen, military service, or foregoing the *benefits and burdens* of citizenship. Because of the circumstances of the moment, he elected not to be a citizen and in exchange received a release from the citizen-

[11]The language quoted is *dictum;* Mannerfrid, it was held, was barred from citizenship. Mannerfrid maintained that he had been misled into the belief that service in the United States military would result in forfeiture of his Swedish allegiance. He would not, he said, have claimed the exemption had he realized the information he received was erroneous. The Second Circuit held that Mannerfrid's was not a *Moser* case because: "Assuming, as we must that the statute does not in all circumstances charge an alien to construe it aright at his peril, we cannot believe that the Court would extend the excuse to cases where, although he knows that the claim will forfeit his right, he is induced to make it because he is mistaken as to what will be the consequences of not making it." (200 F.2d at 733). Petitioner here, unlike Mannerfrid, does not contend he was mistaken as to the negative consequences of his act

obligation. But the government did not honor its end of the bargain. The "exemption" proved illusory. Within a very short time the government did subject petitioner to the obligation of service and he willingly complied. Surely the government cannot now attempt to hold petitioner to his end of the bargain. Surely there was no intelligent waiver of citizenship on petitioner's part. There was no intelligent waiver because the illusoriness of the consideration, in Judge Hand's words, "deprived (petitioner) of a fair chance to make an intelligent choice between exemption and the forfeiture."

III.

THE CONSTITUTIONAL ISSUES

In our petition for writ of certiorari we urged that the conjunction of the Ninth Circuit's opinions in *United States v. Lacher, supra, Lapenieks v. Immigration and Naturalization Service, supra* and this case, placed an irrational and unconstitutional gloss on §315. (Petition, pp. 10-11). Those three cases pro-

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but that he was misled as to the nature of the bargain. Thus, as we note above, petitioner's case comes squarely within the *Moser* rule as understood by Judge Hand.

As an example of the application of the *Moser* rule where the alien, at the time he sought exemption, did understand that he would forfeit the opportunity for citizenship and was misled about the consequences of not seeking the exemption see *In re Bouchage's Petition*, 177 F.Supp. 887 (S.D.N.Y. 1959). Bouchage felt he could make a superior contribution to the allied cause by joining the Free French rather than the United States Army. He was told by his local board that he could do so only by claiming exemption; in fact, there was a selective service policy permitting Free French service in the absence of the exemption. Bouchage was granted citizenship.

vide a rule giving the benefit of §315's two-pronged test to inductees who pass an Army physical but denying it to those who flunk.

The government's answer is that Congress may do whatever it pleases where naturalization is concerned, relying on Congress's constitutional authority "To Establish an Uniform Rule of Naturalization." U.S. Const., Art. I, §8. Memorandum for the Respondent, p. 7.

The government's position is reminiscent of the argument of the bootlegger running liquor across Arkansas in order illegally to sell it in Mississippi. It is worth recalling Justice Jackson's wry observation about the bootlegger's argument:

> "He asks us to hold that one provision of the Constitution [the Commerce Clause] guarantees him an opportunity to violate the other [the Twenty-first Amendment]. The law is not that tricky."
>
> *Duckworth v. Arkansas,* 314 U.S. 390, 397 (1941) (concurring opinion).

United States v. MacIntosh, 283 U.S. 605, 615 (1931), does, true enough, support the government's "bootlegger" contention that naturalization is a "privilege" to be conferred as Congress wishes. But a lot of water has gone under the constitutional bridge in the intervening forty years. The constitutional doctrine which has emerged since *MacIntosh* removes the underpinning from the notion that the conferring of a benefit or privilege "may be conditional upon the surrender of constitutional rights which could not be

abridged by direct government action." *Keyishian v. Board of Regents of New York,* 385 U.S. 589, 605 (1967). Could it seriously be argued today that a law excluding from citizenship Catholics who refused to renounce their church is constitutionally acceptable? If so the navigation around this language from *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) would have to be nimble indeed:

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."

But the vexing question of the limits of Congressional power when conditioning citizenship need not be explored at any great length. Congress has not passed a law making the passing of an Army physical a condition of citizenship. Rather the Ninth Circuit has said that Congress passed such a law. It is the Ninth Circuit gloss with which we have a quarrel, not the plain language of §315. §315 says that those liable for military service are no longer ineligible for citizenship and petitioner clearly falls within that class. We can only make the word "liable" mean "passed his physical" if we torture it beyond recognition. And there is no reason to put it on the rack. There are a number of reasons why it should not be racked and among those are the constitutional infirmities we adumbrated in our Petition. Those constitutional issues are pertinent even in the unlikely event that Congress has the power to confer Naturalization capriciously and in a manner inconsistant with the Bill of Rights because:

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., Japanese Immigrant Case, 189 U.S. 86, 101, 47 L.ed. 721, 726, 23 S.Ct. 611; Dismuke v. United States, 297 U.S. 167, 172, 80 L.ed. 561, 565, 56 S.Ct. 400; Ex parte Endo, 323 U.S. 283, 299, 300, 89 L.ed. 243, 254, 255, 65 S.Ct. 208; American Power Co. v. Securities and Exchange Com., 329 U.S. 90, 107, 108, 91 L.ed. 103, 116, 117, 67 S.Ct. 133; Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 90 L.ed. 586, 592, 66 S.Ct. 456; Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 94 L.ed. 616, 628, 70 S.Ct. 445. Cf. Anniston Mfg. Co. v. Davis, 301 U.S. 337, 81 L.ed. 1143, 57 S.Ct. 816; United States v. Rumely, 345 U.S. 41, 97 L.ed. 770, 73 S.Ct. 543. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

Greene v. McElroy, 360 U.S. 474, 507-508 (1959).[12]

If this Court will not assume that Congress has abandoned the traditional safeguards of due process

[12]The *Greene v. McElroy* rule is, of course, applicable to naturalization cases. Cf. *Delgadillo v. Carmichael,* 332 U.S. 388 (1947). And see *Terrace v. Thompson,* 263 U.S. 197, 220 (1923):

"Congress is not trammeled and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported. The state may properly assume that the considerations upon which Congress made such classification are substantial and reasonable."

without *the most explicit* of actions then it can be safely assumed that it will not go out of its way to construe a statute in a manner violative of the liberties generally accorded people in this Nation. For the purpose of buttressing our contention that §315 should be read to mean what it says (that all those subjected to liability are eligible for citizenship whether they pass an Army physical or not), we discuss the constitutional issues raised by the Ninth Circuit's rendering of §315.

(A) Due Process And The Denial Of Citizenship To Aliens Because They Fail To Pass A Physical Examination.

Each nation defines for itself the qualities it expects a citizen to possess. The definitions are quite fluid and vague, e.g., "good moral character," "attachment to (x) principles" (in our Nation, those of the Constitution) and the like. But we know of no nation where citizenship is extended only to those physically useful to the armed forces. And the last place we should expect to find physical acceptability to the Army as a necessary condition of citizenship is here. One should not be surprised if he discovers some physically imperfect persons among the huddled masses yearning to be free. Yet the government would have petitioner be a citizen had he passed his induction physical examination (A. 14-15) but says he is ineligible because he did not. The only event standing between petitioner and citizenship is his failure to pass the physical.

There is no conceivable relationship between the ability to pass a physical examination and the ability to be a good citizen. And the federal government, no

less than the state government, is precluded from making irrational classifications. *Bolling v. Sharpe*, 347 U.S. 497 (1954).[13] "[A] statutory classification must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud*, 354 U.S. 457, 465 (1957) (footnote omitted).

It is the goal of Naturalization to insure a population of citizens who share the fundamental values of our society. Granting citizenship to those in petitioner's class who pass physicals (see *United States v. Lacher, supra*) while denying citizenship to petitioner does not advance that purpose in any way. §315 should not be interpreted to produce such an irrational and constitutionally questionable result:

> "The stakes are indeed high and momentous for the alien who has acquired residence here. We will not attribute to congress a purpose to make his right to remain here dependent on circumstances so fortuitous as those upon which the Immigration Service here has seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."
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> *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

Similarly here, the government has seized on the fortuitous circumstance of an alien's health, or rather of the military's estimation of his physical utility, to

[13] Aliens as well as citizens receive the Fifth Amendment's protections. See *Wong Wing v. United States*, 163 U.S. 228 (1896); cf. *Gonzales v. Landon*, 350 U.S. 920 (1955) (per curiam).

deny him citizenship. "Respect for the law does not thrive on captious interpretations." *Id,* at 391.

(B) Denying Citizenship Because of the Failure To Pass a Physical Examination is Cruel and Unusual Punishment.

That §315's provision debarring aliens from citizenship who have applied for exemption and been relieved from military liability imposes a penalty seems hardly debateable. See *In re Rego's Petition, supra,* 289 F.2d at 176; *In re Gustavson,* 300 F.2d 251, 252 (S.D. Calif. 1924).

If the penalty were exacted as the price for executing an application for exemption from the armed forces its existence would be unexceptionable. But it is not for his application for exemption that petitioner is being punished. The petitioner in *United States v. Lacher, supra,* made the same application and the government thinks he was properly admitted to citizenship. (A. 14-15). It is *only* because he could not pass the Army's physical examination that the government deems petitioner ineligible for citizenship and imposing a penalty (particularly one so extreme) on one because of an illness violates the Eighth Amendment to the United States Constitution. *Robinson v. California,* 370 U.S. 660 (1962).[14]

[14]There is an additional constitutional problem created by the government's interpretation of §315. The government's rendition makes the military the arbiter of citizenship. One becomes a citizen if the military's physicians find him acceptable. "Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen." *Trop v. Dulles,* 356 U.S. 86, 105 (1958) (concurring opinion of Black, J., joined by Douglas, J.).

CONCLUSION

For all the reasons mentioned, petitioner respectfully urges that the judgment of the Court of Appeals should be reversed and his petition for naturalization be granted.

Dated, San Francisco, California,
March 3, 1971

Respectfully submitted,

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